79-1093

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

ROBERT S. BLY, et al.,

Petitioners,

VS.

DANIEL R. McLEOD, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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9/12/79

605 F2d 124, 47 LW 2206

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IN THE
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October Term, 1979

No. 79-

ROBERT S. BLY, THOMAS A. BRYSON, BENJAMIN M. GIMARC, PAUL MARK HENRICHS and PAUL E. PETERSON, on their own behalf and on behalf of all others similarly situated,

Petitioners,

V.

DANIEL R. McLEOD, Attorney General of South Carolina; RUBEN L. GRAY, EDGAR L. MORRIS, MRS. MARGARET TOWNSEND, and G. P. CALLISON, as members of the State Election Commission; JAMES B. ELLISOR, Executive Director of the South Carolina Election Commission; S. H. RIDDLE, DAVIS O. SMITH, and ERNEST WHITE, as Commissioners of Election for Richland County and as representatives of all Commissioners of Election of South Carolina; and, REV. C. J. WHITAKER, EDWARD C. ROBERTS, and ROBERT E. McNAIR, as members of the Executive Committee of the Democratic Party of Richland County, and as representatives of all County Executive Committees of all political parties of South Carolina, jointly and severally and the successors in the office of each,

Respondents.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 12, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 605 F.2d 134, and is appended hereto at 1a. The denial of the petition for rehearing and suggestion for rehearing en banc, not yet reported, is appended hereto at 14a. The opinions of the United States District Court for the District of South Carolina finding petitioners to be prevailing parties and setting the amount of an award of attorneys' fees are unreported and are appended hereto at 16a and 23a respectively.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was entered on September 12, 1979. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 15, 1979, and this petition for certiorari was filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)

QUESTIONS PRESENTED

1. Whether petitioners, who won injunctive relief pendente lite allowing them and members of their class to vote absentee in a state election, were prevailing parties for a fee award under 42 U.S.C. §§1973l(e) and 1988, where their complaint was later rendered moot by a change in state law and was dismissed without adjudication on the merits?

2. Whether petitioners were prevailing parties where respondents allowed them to vote absentee in subsequent state elections without the necessity of further court order?

3. Whether petitioners, who won major procedural points, i.e. a remand from the Court of Appeals and subsequent order designating a three-judge court to hear the complaint, could be considered prevailing parties?

4. Whether the Court of Appeals erred in refusing to allow petitioners to defend the judgment on the grounds that their

lawsuit was a catalyst for state legislative change, because the issue was not raised in the district court; and if so, whether the record evidence supports the defense?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1973l(e). In any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of costs.

§1988. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners, whose employment required them to be temporarily out of the state, sought, and were denied, absentee ballots with which to vote in the 1972 Democratic primary elections in South Carolina. They subsequently brought this action under 42 U.S.C. §1983 charging that they were being denied the right to vote in violation of Article IV, Section 2 and the First and Fourteenth Amendments of the Constitution of the United States.[1] They asked the court to enjoin state, county and party officials from depriving them and their class of the right to vote and require the issuance of absentee ballots for the primary election.

The district court held a hearing on petitioners' motion for a temporary restraining order and enjoined party officials from denying petitioners' absentee

1. State law at the time provided for absentee balloting by any qualified elector "who will be physically unable to present himself at his precinct on election day." S.C. Code Sec. 23-449.41. Petitioners were denied absentee ballots by party officials pursuant to this provision because of an opinion of the State Attorney General that the phrase "physically unable" was limited to "health reasons." Petitioners did not attack the constitutionality of the statute itself, but the way in which it was interpreted and administered.

ballots for the primary election. By its terms, the order expired after ten days.[1] Subsequently, petitioners were allowed to cast absentee ballots in state general elections when their employment required them to be temporarily out of the state on election day without regard to health reasons or entry of further court orders.

A three-judge court was ordered convened, but before it could hear the complaint on the merits, the state legislature amended the absentee voting laws in 1975 allowing persons who would be out of their counties of residence on election day because of their employment to vote absentee. S.C. Code Secs. 7-15-310 and 320. This action of the legislature, which granted to petitioners the relief they sought as a matter of state law, rendered their §1983

1. The Attorney General subsequently sought an authoritative construction of the absentee ballot statute from the Supreme Court of South Carolina, which upheld his interpretation. Supra, p. 5, n.1; State ex rel. McLeod v. Ellisor, 259 S.C. 364, 197 S.E.2d 188 (1972). Although the state court did not consider the federal constitutional issues, the district court dismissed the complaint. The Court of Appeals in an unreported opinion, vacated and remanded for further consideration. See Bly v. McLeod, 605 F.2d 134, 136 (4th Cir. 1979); 3a. Petitioners then amended their complaint to attack the statute as construed and sought the convening of a three-judge court.

complaint moot.

The complaint was dismissed on mootness grounds, 15a, and petitioners moved for an award of costs and fees under 42 U.S.C. §§19731(e) and 1988. The district court found that they were prevailing parties because they had won the right to vote absentee pendente lite and had prevailed on major procedural points, i.e. they secured a remand from the Court of Appeals and an order convening a three-judge court to hear the complaint. 18a. The court subsequently awarded costs and fees in the amount of $10,705.70. 30a.

The respondents appealed and the Court of Appeals reversed. It held that petitioners had not prevailed because "[n]o adjudication of invalidity of the statute was made," 6a, and "procedural success would not entitle them to an award of attorneys' fees." 7a. The Court refused to consider whether the suit was a catalyst for legislative change, because the issue had not been raised below: "plaintiffs have had their day in court." 10a. Finally, the Court held that "the claim was without merit, the factual/legal condition sought to be changed by the litigation did not deserve the suit." 11a.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Concerning Awards Of Attorneys' Fees Under 42 U.S.C. §§19731(e) And 1988.

a. Petitioners won the right to vote absentee pendente lite.

The Court of Appeals reversed an award of attorneys' fees to petitioners (even though they won an injunction allowing them and their class to cast absentee ballots pendente lite and even though the defendants allowed petitioners to vote absentee in subsequent elections without the necessity of further court order) because the complaint was eventually dismissed as moot as a result of ameliorative state legislative change.[1]

---

1. This lawsuit was a catalyst both in prompting respondents to take action to meet petitioners claims, and for legislative change. The latter is discussed infra at 13.

The Court reasoned that to be prevailing parties, petitioners were required to secure an adjudication of invalidity of the state absentee ballot statute alleged to be unconstitutional. "Neither the district court nor any other court has ever held the statute in question invalid. In order to recover attorneys' fees and costs, plaintiffs must show at least some success on the merits. They simply have not done so." 605 F.2d at 137, 7a.

The decision of the Fourth Circuit conflicts with decisions of other Courts of Appeals, most notably Gagne v. Maher, 594 F.2d 336, 339 (2d Cir. 1979), cert. granted sub. nom. Maher v. Gagne, ___U.S.___, 100 S.Ct. 44 (1979); Criterion Club of Albany v. Board of Dougherty County, 594 F.2d 118 (5th Cir. 1979); Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979); and Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

In Gagne v. Maher, supra, 594 F.2d at 339, the Second Circuit held that where plaintiff secured some relief by way of settlement, but "without a judicial determination that plaintiff had a meritorious constitutional claim," attorneys' fees were nonetheless properly awardable. The Court adhered to the

legislative history of 42 U.S.C. §1988 and concluded that fees could be awarded "whenever plaintiff's efforts confer benefits on the class." 594 F.2d at 340.[1]

Other circuits have adopted the rationale of Gagne v. Maher, supra, and do not require a judicial determination of the merits of a plaintiff's claim as a condition for an award of attorneys' fees. In Criterion Club of Albany v. Board of Commissioners of Dougherty County, supra, the Fifth Circuit held that plaintiffs could recover fees, even though an intervening legislative change, as here, mooted their voting rights suit.

The fact that the case never proceeded to judgment was found uncontrolling. Indeed, the Fifth Circuit concluded that it would be an abuse of discretion to deny fees if it could be shown that plaintiffs played an active part in achieving a benefit for

---

1. The district court found the benefits conferred here to include, among others, the right to vote. 19a. The Court of Appeals characterized the injunctive relief won by petitioners as "merely preserv[ing] the status quo." 605 F.2d at 137; 6a. The injunction did not, however, preserve the status quo, for the state of things existing at the time the complaint was filed was that petitioners could not vote absentee.

their class. 594 F.2d at 120.

Gagne v. Maher, supra, has also been followed by the Third Circuit in Ross v. Horn, supra. There, in a case dismissed as moot because of intervening changes in State Department of Labor and Industry procedures, the Court refused to give conclusive weight to the form of the judgment and looked instead to the substance of the lawsuit's outcome in determining if plaintiffs were entitled to a fee award. If plaintiffs produced a benefit, they "were prevailing parties with respect to a portion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims." 598 F.2d at 1322.

The First Circuit has adopted a similar standard, one which would support an award in this case: "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978).

The decision below is thus contrary to the authority of other circuits which

hold that a party is prevailing for purposes of an award of attorneys' fees who wins on an important matter or secures a right or benefit, without regard to whether formal relief or an adjudication on the merits is obtained. Here, petitioners won injunctive relief allowing them and their class to vote while their lawsuit prompted respondents to take action to meet petitioners' claims. The denial of attorneys' fees so conflicts with decisions of other circuits as to justify the grant of certiorari to review the judgment below.

b. Petitioners won important procedural victories.

The Court of Appeals also rejected petitioners' contentions that they were prevailing parties because they won important procedural victories, i.e. a decision on appeal vacating and remanding the dismissal of the complaint by the district court, and an order convening a three-judge court: "It is clear that if the plaintiffs had ultimately lost on the merits that their . . . examples of procedural success would not entitle them to an award of attorneys' fees." 605 F.2d at 137; 6a. The decision is in conflict

with Van Hoomissen v. Xerox Corporation, 503 F.2d 1131 (9th Cir. 1974).

In Van Hoomissen, fees were awarded to the defendant in a Title VII case whose only success was winning an appeal limiting the EEOC's intervention to a retaliation claim. The Ninth Circuit noted that although the defendant won the appeal, it might still lose the principal case and thus not prevail on the merits. Nonetheless, the Court ruled that the fact defendant "prevailed on this appeal qualifies it as a 'prevailing party' eligible for an award of attorney's fees connected with the appeal." Van Hoomissen v. Xerox Corporation, supra, 503 F.2d at 1133.

This conflict justifies the grant of certiorari in this case.

2. The Decision Below Conflicts With Decisions Of This Court Allowing An Appellee To Defend A Judgment On Any Ground Consistent With The Record.

Petitioners sought to defend the judgment of the district court on appeal by arguing that they were a catalyst for

legislative change.[1] The record evidence upon which they relied was the sequence of relevant events and the fact that the language of the ameliorative state legislation precisely described them, i.e. "persons who by virtue of their employment obligations are unable to vote in person." Brief of Appellees, pp. 20-1.[2]

The Court of Appeals, however, refused to consider petitioners' catalyst argument because it was not raised in the district court. "At the hearing, the plaintiffs not only failed to present any evidence on this point, they failed to even raise the argument. Thus, it appears that plaintiffs have had their day in court." 605 F.2d at 138; 10a.[3]

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1. Relevant cases provide that where a lawsuit is a catalyst for change in the law, plaintiffs may be deemed prevailing parties for purpose of a fee award. Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978); Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979).

2. "The chronology of events" has been held to constitute evidence of catalytic effect. Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979); Evans v. Sheraton Park Hotel, 503 F.2d 177, 189 (D.C. Cir. 1974). In International Society for Krishna Consciousness v. Anderson, 569 F.2d 1029 (8th Cir. 1978), chronology alone, with no finding of causation, was deemed sufficient to support an award of fees.

3. It is not clear what evidence, other than that presently in the record, could have been presented. (cont'd)

The Court of Appeals decision is plainly at odds with the rule in United States v. American Railway Express Company, 265 U.S. 425, 435 (1924), which provides that an appellee may "urge in support of a decree any matter appearing in the record." The rule has been consistently applied, see e.g. Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.") Indeed, in Massachusetts Mutual Life Insurance Company v. Ludwig, 426 U.S. 479 (1976), this Court granted summary reversal for failure of the Court of Appeals for the Seventh Circuit to comply with the rule in American Railway Express Company.

The failure of the Court below to follow the rule of this Court justifies the grant of certiorari.

(3. cont'd) South Carolina compiles no legislative history, e.g. debates and reports, other than bills, resolutions and vote totals. As for putting legislators on the stand, the Court of Appeals expressed doubts that that could be done. 13a. Also see, Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 268 (1977).

3. The Decision Below Construes Two Important Federal Statutes In A Manner Grossly At Variance With Legislative Intent.

The legislative histories of both 42 U.S.C. §§19731(e) and 1988 show that Congress intended that parties who achieve something short of full vindication via the judicial process be entitled to attorneys' fees. The Senate report for §1988 states:

> Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. (cites omitted) Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. (cites omitted) S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976).

The Senate report for §19731(e) is in accord. See, S. Rep. No. 94-295, 94th Cong., 1st Sess. 41 (1975).

The House report for §1988 concurs and provides examples to explicate these intentions:

> The phrase 'prevailing party' is not intended to be limited to the victor after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury . . . [A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976).

Congress intended to encourage enforcement of protected rights by private citizens. It also intended to make clear that plaintiffs were not required to try cases in which non-judicial settlement was possible merely to insure a fee award. Any other definition of "prevailing party" would

be a prescription for promoting intransigent litigation. Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D. N.Y. 1975).

The Court of Appeals decision in this case, unfortunately, is just such a prescription. Although the defendants voluntarily allowed plaintiffs to vote absentee after expiration of the temporary restraining order without the necessity of further court proceedings, Fourth Circuit plaintiffs will now be required to pursue to final resolution all judicial remedies available to them, without regard to whether settlement is possible, to secure attorneys' fees awards. Such a result is at variance with the intent of Congress in enacting modern attorneys' fees legislation. It is also contrary to public policy. Williams v. First National Bank, 216 U.S. 582 (1910).

Certiorari should be granted so that the construction of these important statutes may be brought in line with congressional intent.

4. This Case Presents A Question That Is Identical With, Or Similar To, An Issue Already Pending Before This Court In Another Case In Which Certiorari Has Been Granted.

This Court has granted certiorari in Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), cert. granted sub. nom. Maher v. Gagne, ___U.S.___, 100 S.Ct. 44 (1979), a case which presents, as here, the question of plaintiff's entitlement to attorneys' fees in a case under 42 U.S.C. §§1983 and 1988 in which the constitutional claims were never determined.

The Court of Appeals in Gagne v. Maher, supra, awarded fees to the plaintiff who had secured a consent decree pursuant to related claims under the Social Security Act. The defendant objected to the award because there was no judicial determination that plaintiff had a meritorious constitutional claim. 594 F.2d at 339. The Court of Appeals concluded that a fee award was supportable where the constitutional claim was substantial, and it was not necessary for plaintiff to secure final judgment or even to show that the claim "would have

been successful at trial." 594 F.2d at 340.[1] Since the Fourth Circuit held that petitioners could recover fees here only if they showed success on the merits of their claims that the state statute was unconstitutional, an affirmance in Gagne v. Maher, supra, may require reversal or remand.

Certiorari should be granted because of the pendency of a similar issue before this Court.

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1. The Court of Appeals was of the opinion that "the claim was without merit," 605 F.2d at 139, 11a, a finding it had no power to make in a moot case. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). That the issues were in fact substantial cannot be seriously questioned. See O'Brien v. Skinner, 414 U.S. 524 (1974). Indeed, the order of October 15, 1974, convening a three-judge court found that the complaint raised "a substantial federal question." Joint Appendix, p. 75.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2371

ROBERT S. BLY, THOMAS A. BRYSON, BENJAMIN M. GIMARC, PAUL MARK HENRICHS and PAUL E. PETERSON, on their own behalf and on behalf of all others similarly situated

Appellees

v.

DANIEL R. McLEOD, Attorney General of South Carolina; RUBEN L. GREY, EDGAR L. MORRIS, MRS. MARGARET TOWNSEND, and MRS. G. P. CALLISON, as members of the State Election Commission; JAMES B. ELLSIOR, Executive Director of the South Carolina Election Commission; S. H. RIDDLE, DAVID O. SMITH, and ERNEST WHITE, as Commissioners of Election for Richland County and as representatives of all Commissioners of Election of South Carolina

Appellants

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert W. Hemphill, District Judge.

Argued January 11, 1978
Decided September 12, 1979

Before HAYNSWORTH, Chief Judge, WIDENER and HALL, Circuit Judges.

David C. Eckstrom, Attorney General's Office (Daniel R. McLeod, Attorney General,

C. Tolbert Goolsby, Jr., Deputy Attorney General, Treva G. Ashworth, Assistant Attorney General, on brief) for Appellants; Laughlin McDonald (Neil Bradley, Christopher Coates, on brief) for Appellees.

WIDENER, Circuit Judge:

The state defendants appeal from the district court's order awarding attorneys' fees and costs to plaintiffs as prevailing parties pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, the Voting Rights Act of 1965, §14(3) as amended, 42 U.S.C.A. §1973l(e),[1] and Federal Rule of Civil Procedure 54(d).[2] We reverse.

The plaintiffs, a group of chemistry professors who planned to be out of the state on election day attending a professional convention, applied for absentee ballots to vote in the 1972 Democratic primary. Their applications were denied based on an opinion of the South Carolina Attorney General which construed the language "physically unable to present himself" in the then absentee ballot statute to include those who were physically unable to appear due to ill health but not those who would be otherwise physically absent from the geographic boundaries of the state.[3] After the

Democratic Party denied their applications, the plaintiffs filed a class action suit in the district court alleging that the statute as construed by the South Carolina Attorney General violated their constitutional rights to vote and travel. The plaintiffs requested and received a temporary restraining order which allowed them to vote in the 1972 primary. The South Carolina Attorney General subsequently filed a collateral proceeding in the South Carolina Supreme Court seeking a binding interpretation of the previously unconstrued statute. The South Carolina Supreme Court upheld the Attorney General's interpretation, but did not reach the federal constitutional question. State ex rel McLeod v. Ellisor, 259 S.C. 364, 192 S.E.2d 188 (1972). Shortly after the state court decision, the federal district judge dismissed the federal proceedings. Plaintiffs appealed, and we vacated and remanded the case because we could not determine the basis for the district judge's decision, expressing no opinion on the merits.

On remand, the plaintiffs moved for and were granted a three-judge district court to determine the constitutionality

of the absentee voting statute as interpreted by the South Carolina Supreme Court. Before any proceedings were held before the three-judge court, however, the South Carolina legislature amended the absentee voting statute. This amendment, among other things, granted the right to vote by absentee ballot to certain persons including those who would be out of their counties of residence on election day due to their employment or certain professions including teaching.[4] It is agreed that the 1975 amendment effectively mooted plaintiffs' case.

In May 1977, plaintiffs moved for attorneys' fees and costs. The district court dismissed the case as moot but retained jurisdiction over plaintiffs' motion for attorneys' fees and costs. At a hearing on this motion, the plaintiffs asserted three reasons why they were the prevailling party in this case. First, the district court had granted their request for a temporary restraining order which allowed them to vote in the Democratic primary. Second, they had received a remand from the Fourth Circuit. Third, they had successfully requested the empaneling of a three-judge district court.

Based on these three reasons, the district court, considering the claim under 42 U.S.C. §1973l(e) (voting rights) and 42 U.S.C. §1988 (civil rights), held that the plaintiffs were the prevailing parties and awarded attorneys' fees and costs.[5]

It is settled that in order to be a prevailing party one need not win on every issue in the case. Lytle v. Commissioner of Elections of Union County, 541 F2d 421 (4th Cir. 1976). A party prevails if judgment is entered in his favor even though he did not sustain his entire claim. Lytle, 541 F2d at 426, n. 6; 10 Wright & Miller, Federal Practice & Procedure, Civil, §2667. The legislative history of §1973l(e) states that in some circumstances fees may be allowed if the plaintiff prevails "on an important matter even when he ultimately does not prevail on all issues." Senate Report 94-295, 1975 U.S. Code & Ad. News, 807, 808. But we think that the three points on which plaintiffs prevailed are not sufficient, whether considered separately or together, to give plaintiffs prevailing party status. The granting of a temporary restraining order in the situation presented here was in no way a determination on the merits

and merely preserved the status quo when the plaintiffs might be irreparably harmed if temporary relief were not granted. A temporary restraining order may be entered ex parte. FRCP 65. In the case at bar, however, the defendants were present, but the state defendants did not feel they were appropriate parties to a motion requesting the right to vote in a primary election. The Democratic Party also was present but did not oppose the motion; indeed, it apparently acquiesced. In any event, the granting of the temporary restraining order hardly can be said to constitute generally prevailing on the merits. No adjudication of invalidity of the statute was made. See Lytle, p. 425.

Plaintiffs fare no better with their other two arguments. Our decision to vacate and remand the first dismissal of this case expressly stated that we expressed no opinion on the merits, but that we remanded for clarification of the basis for the district court's decision. Likewise, we do not see how the mere constitution of a three-judge district court can be said to make plaintiffs the prevailing parties. It is clear that if the plaintiffs had ultimately lost on the merits that their

three examples of procedural success would not entitle them to an award of attorneys' fees. Neither the district court nor any other court has ever held the statute in question invalid. In order to recover attorneys' fees and costs, plaintiffs must show at least some success on the merits. They simply have not done so.

On appeal, plaintiffs argue, for the first time, that they are the prevailing parties because the amendment to the South Carolina absentee ballot law granted them the relief they sought in federal district court, and that they acted as a catalyst which caused or at least hastened the change of law which mooted their case.

There are cases which, in factual settings far different from the case here, do state the proposition that a person may be a prevailing party if his lawsuit acts as a catalyst which causes the relief sought even though no decision is reached on the merits. In Parham v. Southwestern Bell Telephone Co., 433 F2d 421 (8th Cir. 1970), Parham, the individual defendant, brought a class action against defendant phone company in 1967 alleging violations of Title VII of the Civil Rights Act of

1964. The court held that the company had discriminated against the class from 1965 to 1967, but that Parham could not recover back pay on his individual claim because the company refused to hire him due to a poor recommendation given by a prior employer. The court nevertheless awarded attorneys' fees to Parham because his "lawsuit had acted as a catalyst which prompted the [company] to take action implementing its own fair employment policies . . . ." 433 F2d at 429.

We used an analogous approach in Brown v. Gaston County Dyeing Machine Co., 457 F2d 1377, 1383 (4th Cir. 1972). In Brown, the individual plaintiff was unable to prevail on his claim that he was refused a promotion because of his race although he did recover on a §1981 claim for a period of time when the company refused to hire him. With respect to the class claim, the district court found that the company was guilty of discrimination from 1965 to 1967, but that its voluntary compliance efforts since that time had remedied the problem. The district judge therefore dismissed the case. On appeal, we agreed that the company had made significant improvements, but found that the process

was as "yet incomplete." 457 F2d at 1383. We therefore remanded the case to the district court with instructions to retain it on the docket for a reasonable time. If the company's program eliminated discrimination in that time the case would be dismissed. Concluding, we stated that "[i]n either event, the plaintiff is entitled to recover his costs and reasonable counsel fees." Id.

Brown and Parham are not persuasive in the case at bar. In each case, the court found the class had received benefits and awarded attorneys' fees even though the individual plaintiff had not prevailed on his individual claim (Brown did in part). The same attorneys represented both the individual plaintiffs and the class, and the classes prevailed in each case since they received benefits. It follows that the prevailing class should not be refused attorneys' fees simply because the individual who initiated the action did not ultimately prevail on his personal claim. In Brown, the class remedy adopted by the court of appeals may not have been exactly what plaintiff would have preferred, but it is clear the court found that the class received the benefit of the lawsuit. There

was no finding of any wrong to the individuals or to the class in the case at hand. The merits of the case were never reached.

Even if we were to adopt a catalyst theory, and even if plaintiffs were allowed to inquire into the reasons for the South Carolina legislature's actions,[6] it is clear that they had this opportunity and did not exercise it. The district could (sic) held a hearing on the issue of attorneys' fees and the plaintiffs were allowed to present evidence in support of their motion. At the hearing, the plaintiffs not only failed to present any evidence on this point, they failed to even raise the argument. Thus, it appears that plaintiffs have had their day in court and we should not remand the case for further fact finding.

The subject matter of the present question has just been considered by us in the case of Bonnes v. Long, No. 78-1168, ___F2d___(4th Cir. 1979), a claim under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988. §§1973l(e) and 1988 are phrased in identical terms, and we apply the same rule of decision under both of them. See 1975 U.S. Code Cong. and Ad. News, p. 807. The rule we established in

Bonnes, whatever its antecedents, is described as pragmatic and is that, in deciding whether one is a prevailing party under the statute, the court should consider the precise factual/legal condition the fee claimant has sought to change, and with that done and as a benchmark, the court should then consider whether the plaintiff fee claimant's efforts contributed in a significant way to the change. The plaintiffs' claim here does not fulfill either part of the Bonnes test. Because the claim was without merit, the factual/legal condition sought to be changed by the litigation did not deserve the suit. Also, there is nothing in the record to indicate that the plaintiffs' efforts contributed to the amendment of the statute. That being true, we need not consider whether there are special circumstances which might otherwise justify the denial of a fee award as a matter of discretion. Bonnes, sl. op. p. 7.

The plaintiffs not being the prevailing parties, accordingly, the judgment of the district court is

REVERSED.

1. Section 1973l(e) states: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The operative part of Section 1988 is in like language.

2. Rule 54(d) states in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."

3. South Carolina Code Section 23-449.41 (1972 Supplement Volume).

4. The 1975 amendment states in pertinent part: "Any qualified elector in the following categories shall be permitted to vote by absentee ballot in all elections when he will be absent from his county of residence on election day, to such extent that it would prevent him from voting in person except that "physically disabled persons" may vote by absentee ballot whether or not absent from their county of residence:

* * * * *

(4) Employment.

* * * * *

(8) Professions of ministry, teaching, and medical.

* * * * *

South Carolina Code Section 23-2442 (1975 Supplement).

Prior to 1975, Section 23-442 read as follows:

(1) Every individual specified in subsection (2) of this section who is absent from the place of his voting residence, but otherwise eligible to register and qualified to vote in any general election in this State, shall be entitled to vote

in elections in accordance with the provisions of this chapter.

(2) The following individuals, if otherwise eligible under subsection (1) of this section, shall be entitled to vote in accordance with the provisions of this chapter:

(a) members of the Armed Forces of the United States and their spouses,

(b) members of the Merchant Marine of the United States,

(c) persons serving with the American Red Cross or with the United Service Organizations who are attached to and serving with the Armed Forces of the United States outside of the counties of their respective residences, and

(d) members or employees of any department of the United States Government serving overseas.

In 1972, Section 23-449.41 was added which states: "Any qualified elector who will be physically unable to present himself at his precinct on election day shall be permitted to vote by absentee ballot." This is the section in effect when this case was commenced.

5. The court awarded attorneys' fees and costs against the state defendants but not against the Democratic party defendants, reasoning that the party defendants "were not responsible for the passage of the allegedly unconstitutional statute and had absolutely no discretion in its execution." This holding is not appealed from by the plaintiffs but is by the state defendants. In view of our disposition of the case, we do not reach the question of whether judgment should have been entered against the party defendants as well as the state defendants.

6. While we do not decide the question, it is not at all clear that plaintiffs should be allowed to prove any influence on the act of the legislature since such proof might constitute an impermissible inquiry into legislative motive. See Fletcher v. Peck, 6 Cranch. 87 (1810); Tenney v. Brandhove, 341 U.S. 367 (1951).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2371

ROBERT S. BLY, et al,

Appellees

V.

DANIEL R. McLEOD, etc., et al.

Appellants

ORDER

We have considered the petition for rehearing as supplemented and amended.

There being no request for a poll of the court, it is ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Haynsworth and Judge Hall.

/s/ T.F. Widener
For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISON

ROBERT S. BLY, et al.

Plaintiffs,

v.

CIVIL ACTION

No. 72-988

DANIEL R. McLEOD, et al.

Defendants.

ORDER

It appearing to the Court that this case has been rendered moot by enactment of the South Carolina General Assembly of legislation authorizing persons to vote absentee who are unable to vote in person by virtue of their employment obligations, §§23-441 and 442, Code of Laws of South Carolina, 1962, as amended, and it further appearing that plaintiffs have moved the Court for costs and attorneys' fees,

IT IS HEREBY ORDERED that this case be dismissed without prejudice on the grounds of mootness except that the Court retains jurisdiction over Plaintiffs' motion for costs and attorneys' fees.

AND IT IS SO ORDERED.

/s/ Robert W. Hemphill
UNITED STATES DISTRICT JUDGE

May 20, 1977
Columbia, South Carolina

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROBERT S. BLY, et al.,	]	
	]	
Plaintiffs,	]	
	]	CIVIL ACTION
v.	]	
	]	No. 72-988
DANIEL R. McLEOD, et al.,	]	
	]	
Defendants.	]	

ORDER ON PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES

This was a civil rights action brought by plaintiffs pursuant 42 U.S.C. §§1983 and 1973aa-1. The suit was originally designed to challenge the constitutionality of the absentee ballot provisions of the South Carolina voting laws. The original suit was filed on August 22, 1972 and dismissed on October 25th of the same year by this court, on this court's belief that the South Carolina Supreme Court had ruled on the identical issue and that proper review could only be had by the United States Supreme Court. Said order was appealed, reversed and remanded by the Fourth Circuit Court of Appeals on July 13, 1973. On October 11, 1974, this court requested, and subsequently received, a designation

of a three-judge court to hear this case and an assignment of this case to such panel. Prior to the final adjudication of this case on the merits, the General Assembly of the State of South Carolina amended the election laws, including those related to absentee balloting, in such a fashion as to render the case moot. The plaintiffs now move the court for an award of reasonable attorneys' fees pursuant to 42 U.S.C §§1973L(e)[1] and 1988[2].

The aforementioned statutes authorizing attorneys' fees were enacted during the pendency of this litigation. The Supreme Court of the United States removed any doubt as to the applicability, to pending litigation, of statutes authorizing attorneys' fees in the case of Bradley v. School Board of the City of Richmond, 416 U.S. 696, 40 L.Ed.2d 476 (1974). In Bradley, the Court resolved the question of whether 20 U.S.C. §1617, authorizing attorneys' fees in school desegreation cases, should be applied in a case where the sole issue pending on appeal, when the statute became law, was the propriety of an award of attorneys' fees. The court held that it was appropriate to apply the statute and said,

> We anchor our holding in this case on the principal that a court

is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. It is obvious that this court is called upon to render its decision in this matter at a time subsequent to the passage of both of the statutes in question. There is no evidence or indication in the record that the imposition of attorneys' fees in this case would result in manifest injustice. Furthermore, the statute reveals no direction that it should not be applied retrospectively.

The plaintiffs in this case did not ultimately prevail on the merits of the case because, as previously mentioned, the actions of the General Assembly of South Carolina rendered the case moot prior to final adjudication. Defendants argue that, since the plaintiffs did not bring the case to a successful final conclusion, they are not prevailing parties under the meaning of these statutes. The court cannot agree with this contention. The plaintiffs in

this case received an injunction allowing their class to vote in the August 29, 1972 Democratic Primary. Subsequent to their dismissal in this court, they procured, from the Fourth Circuit Court of Appeals, an order vacating the opinion of the dismissal and remanding their case for consideration. Plaintiffs successfully prosecuted this action during its entire pendency and, although they did not ultimately prevail on the merits, they must be considered prevailing parties within the contemplation of Section 402, and Sections 1983. With respect to Section 402, the Fifth Circuit held that plaintiffs in a voting rights action who received only partial relief may be considered a prevailing party for purposes of award of attorneys' fees. Lytle v. Commissioners of Elections of Union County, 541 F.2d 421 (5th Cir. 1976). With respect to Section 1988, the legislative history clearly contemplates the award of attorneys' fees to whose (sic) who have substantially prevailed in an action:

> In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See Bradley v. School Board of the

City of Richmond, 415 U.S. 696 (1974). Such awards are expecially (sic) appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. Kopet v. Equire Realty Co., 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970); Aspira of New York, Inc. v. Board of Education of the City of New York, 55 F.R.D. 541 (S.D. N.Y. 1975).

For the foregoing reasons, the plaintiffs in this action are entitled to a reasonable attorney's fee as against the State defendants. The defendants Richland County Democratic Party and Democratic Party of South Carolina, should not, however, be made to bear the financial burden of plaintiffs' attorneys' fees in that they were not responsible for the passage of the allegedly unconstitutional statute and had absolutely no discretion in its execution. These factors may well have ultimately resulted in their dismissal had this suit been prosecuted to final adjudication. As such, it would be unjust to force these defendants to contribute to any recovery of attorneys' fees on the part of the plaintiffs. Plaintiffs' attorneys will submit their request for a specific amount, accompanied by supporting documents including but not limited to an itemized record of time spent on the case. Such request will be filed with this court, and served upon the defendants, within 15 days of the date of the filing of this order. Defendants will have five days thereafter to file any response which they may deem necessary.

AND IT IS SO ORDERED.

/s/ Robert W. Hemphill

ROBERT W. HEMPHILL
United States District
Judge

Columbia, South Carolina
July 22, 1977.

---

1. 42 U.S.C. Sec. 1973L(e) reads: In any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. 42 U.S.C. Sec. 1988 reads, in pertinent part: "In any action or proceeding to enforce a provision of Secs. 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318 or in any civil action or proceeding by or on behalf of the United States to enforce, or charging a violation of, any provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROBERT S. BLY, et al.,	]	
	]	
Plaintiffs,	]	
	]	CIVIL ACTION
V.	]	
	]	No. 72-988
DANIEL R. McLEOD, et al.,	]	
	]	
Defendants.	]	

ORDER ON DEFENDANTS'
MOTION TO AMEND

Defendants move the court to vacate and amend its order of July 22, 1977, granting attorneys' fees to plaintiffs pursuant to 42 U.S.C. §§1973l(e) and 1988. Plaintiffs oppose defendants' motion and move for an order of this court establishing a reasonable amount for the attorneys' fees previously granted.

Defendants move for relief of the order awarding attorneys' fees against the Attorney General of South Carolina, the Executive Director of the State Election Commission, the State Election Commission and the Commissioners of the Election for Richland County on the grounds that each of these defendants, while acting in their official capacity as organs of the state

government, are alter egos of the State of South Carolina and therefore immune from suit in the federal courts under the Eleventh Amendment. The Eleventh Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, if commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although this Amendment has been interpreted to enable individuals to bring actions in federal courts against states seeking only prospective equitable relief, Ex parte Young, 209 U.S. 123, 52 L.Ed. 714 (1908), the Supreme Court has consistently held that, absent an enabling statute, a state is immune from actions for monetary relief. Edelman v. Jordan, 415 U.S. 651. 39 L.Ed.2d 665 (1974). This ruling also applies to state agencies and officials while operating in their official capacities as alter egos of the state. As the court said in Edelman:

> It is also well established that even though a State is not named a party to the action, the suit

may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), the Court said:

> '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its soverign immunity from suit even though individual officials are nominal defendants.' Id., at 464, 89 L.Ed. 389.

Thus the rule has evolved that a

> suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 39 L.Ed.2d 672 (citations omitted.)

The most recent Supreme Court consideration of states' immunity from suit under the Eleventh Amendment was in Fitzpatrick v. Bitzer, ___U.S.___, 49 L.Ed.2d 614 (1976). In Fitzpatrick, a state challenged the validity, under the Eleventh Amendment, of the 1972 Amendments to the Civil Rights Act of 1964, which specifically authorized

private suits for back pay by state employees against a state for violations of Title VII of that Act. The state there argued that such actions for back pay were actions for monetary relief brought against the state in federal court and were therefore directly within the prohibition of the Eleventh Amendment. The Court found that the Eleventh Amendment did not bar suits against states which were properly provided for under the Fourteenth Amendment because the Fourteenth Amendment is specifically directed at the conduct of individual states, stating:

> We think that the Eleventh Amendment and the principle of states sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. In that section, Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embodied significant limitations on state authority. When Congress acts pursuant to

Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation, for the purposes of enforcing the provisions of the Fourteenth Amendment,' provide for private suits against states or state officials which are constitutionally impermissible in other context. 49 L.Ed. at 621 (citations omitted.)

The opinion is clearly based upon two factors, (1) the special nature of the Fourteenth Amendment as an amendment which regulates the activities of states and therefore may encroach upon the Eleventh Amendment, and (2) the fact that Congress, in exercising its authority to enforce the Fourteenth Amendment, has given specific and express authorization to individuals for actions against states under Title VII of the 1972 Amendment.

Plaintiffs claim for attorneys' fees in this action is based upon 42 U.S.C. §§1988 and 1973l(e). 42 U.S.C. §1988 is the Civil Rights Attorneys' Fees Act, which, among other things, authorizes an award of attorneys' fees in actions under 42 U.S.C. §1983. Plaintiffs claim to attorneys' fees under §1988 is based upon their cause of action in this case under §1983. On reconsideration, it is clear that an award of attorneys' fees against a state pursuant to §§1983 and 1988 is barred by the Eleventh Amendment under the rationale of the Edelman case. The Eleventh Amendment exception set out in the Fitzpatrick case does not apply to cases brought under 42 U.S.C. §1983 in that §1983 does not contain any expression of congressional intent that actions may be brought directly against states in federal court to enforce the Fourteenth Amendment.

The plaintiffs also seek an award of attorneys' fees pursuant to 42 U.S.C. §1973l(e), which provides that the court, in its discretion, may allow attorneys' fees to the prevailing party in any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth

Amendments. Section 1973l(e) is the attorneys' fees section of the Voting Rights Act of 1965. The original prohibitive text of the Voting Rights Act of 1965 was contained in 42 U.S.C. §1973, which states:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contradiction of the guarantee set forth in sections 1973b(f)(2) of this title.

The Voting Rights Act of 1965 specifically authorizes law suits by both the federal government and invidividuals against states to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments. The Act also specifically authorizes, through 42 U.S.C. §1973l on the part of Congress to override states sovereignty in implementing the voting guarantees of the Fourteenth and Fifteenth Amendments combined with specific congressional authorization for actions against states and awards of attorneys' fees in those

actions brings the award of attorneys' fees pursuant to §1973l(e) within the Eleventh Amendment exception in the Fitzpatrick case. For this reason, an award of attorneys' fees authorized by 42 U.S.C. §1973l(e) against a state government or its alter egos is not barred by the Eleventh Amendment. The defendants' motion for reconsideration of this court's order of July 22, 1977 is therefore denied.

The plaintiffs' motion for an award of reasonable attorneys' fees was granted by this court's order of July 22, 1977. The plaintiffs have now submitted the supporting documents to assist the court in the determination of a reasonable fee and the court finds the amount of $9,750.00 to be reasonable under the circumstances of this case. The Clerk shall enter judgment in favor of the plaintiffs for attorneys fees in the amount of Nine Thousand Seven Hundred Fifty ($9,750.00) and Nine Hundred Fifty-five and 70/100 ($955.70) costs.

AND IT IS SO ORDERED.

/s/ Robert W. Hemphill

ROBERT W. HEMPHILL
United States District Judge

Columbia, South Carolina
August 18, 1977

Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1093

ROBERT S. BLY, ET AL.,

Petitioners,

vs.

DANIEL R. McLEOD, ETC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

DANIEL R. McLEOD
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ATTORNEYS FOR RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1093

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 605 F.2d 134 and is set out in the Appendix of the Petition at 1a.

The orders of the District Court are unreported and are set out in the Appendix of the Petition at 15a and 16a.

JURISDICTION

The Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Whether the petitioners are the prevailing party and entitled to an award of attorneys' fees against the respondents under 42 U.S.C. §§ 19731(e) and 1988 by virtue of the fact that the District Court entered a temporary restraining order against a party other than the respondents in a case which was later dismissed on the ground of mootness?

II.

Whether the petitioners are the prevailing party and entitled to an award of attorneys' fees against the respondents under 42 U.S.C. §§ 1973l(e) and 1988 by virtue of the fact that the Court of Appeals vacated and remanded an earlier order of dismissal without determining the merits of the claim, or by virtue of the fact that a three-judge court was designated to hear the claim?

III.

Whether the petitioners should be deemed the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988 after their claim was dismissed as moot, when the District Court made no finding that they had obtained a benefit from the respondents as a consequence of this litigation?

STATEMENT OF THE CASE

The petitioners sought to obtain absentee ballots with which to vote in the 1972 South Carolina Democratic Party primary election because they intended to be away from their residences on election day for reasons related to their employment. Their absentee ballot requests were denied because state election law at that time did not permit absentee voting by persons who were away from their residences on election day for reasons related to their employment. Therefore, on the eve of the primary election the petitioners brought suit against certain state, county, and Democratic Party officials to obtain an absentee ballot.

Two days after the commencement of the suit the petitioners obtained a temporary restraining order against the

Democratic Party defendants. 1/ The temporary restraining order enjoined the party officials from refusing to issue absentee ballots to the petitioners and further directed the party officials to count and retain those ballots separately. Infra at 2-A. The temporary restraining order expired after ten days. Id.

There was no finding by the District Court that the petitioners obtained any additional voting rights whether voluntarily or otherwise, as a consequence of this lawsuit. The attorney for the petitioners suggested to the District Court that one of the petitioners, Bly, was permitted to vote absentee in a subsequent Democratic Party primary election and run-off election while away from his residence as a "visiting scholar." Supplemental Appendix, 19, 51. At this time South

1/ The Democratic Party defendants did not make an appeal and they are not respondents herein.

Carolina election law permitted a qualified student to vote by absentee ballot. No proof was offered by the petitioner, however, and no finding of fact was made as to the reason for this petitioner's voting by absentee ballot. Furthermore, no other specific instance of absentee voting by a petitioner or a member of that class was ever found by the district court. (Supplemental Appendix 19, 51; Appendix 80, 85; see Appendix to Petition, 4a, 5a). It should be noted that the respondents' Amended Answer alleges that the petitioners voted by absentee ballot in the 1972 General Election. (Supplemental Appendix, 60). However, the District Court did not find whether they did vote, and if they did, whether they voted pursuant to existing statutory authority, as a result of error, or for any other reason. The petitioners simply did not seek a finding in the District Court as to the cause, or even the occurrence, of any subsequent

absentee voting by themselves or their class.

In 1975, the South Carolina General Assembly enacted a broad revision to its election laws, providing among other things for the extension of the absentee ballot in state elections to those persons who are absent from their county of residence on election day due to employment. 2/ Two years later the District

---

2/ The amended statute added five new categories of voters who could vote by absentee ballot if they were absent from their county of residence on election day due to the following reasons:

* * *

(4) Employment.
(5) Physically disabled persons.
(6) Governmental employee, their spouses and dependents residing with them.
(7) Electors with a death or funeral in the family within a three day period prior to the election.
(8) Professions of ministry, teaching, and medical.
(9) Persons on vacation.

§ 7-15-320, S.C. CODE, 1976.

Court found that the petitioners' claim had been mooted by the revised state statute, and it awarded them attorneys fees against the state and county government defendants. The district court found that, although the petitioners did not ultimately prevail on the merits, they nonetheless prevailed for purposes of an award of attorneys' fees because they obtained the temporary restraining order described above, because the first dismissal of their claim was vacated by the Court of Appeals and remanded to allow the District Court to state its finding of fact and conclusions of law, and because a three-judge court was designated to hear this case. (Pet. 16a) The state and county government defendants appealed the award of attorneys fees. The

Fourth Circuit Court of Appeals reversed the trial court, finding among other things that the petitioners had obtained no benefit as a consequence of this litigation. (Pet. 11a) Therefore, they were not the prevailing party and they were not entitled to an award of attorneys fees.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

There is no conflict between the decisions of other Courts of Appeals and the decision below denying the petitioners an award of attorneys' fees against the respondents under 42 U.S.C. §§ 1973l(e) and 1988 because the petitioners obtained no appropriate relief from the respondents as a consequence of this litigation.

In the decision below, the Court of

Appeals reversed an award of attorneys fees on the ground that the petitioners were not the prevailing party. The record establishes that the petitioners' claim was dismissed on the grounds of mootness and it does not establish that they obtained any relief, voluntary or otherwise, as a remedy for any constitutional violation. Therefore, they are not entitled to an award of attorneys' fees under the subject statutes. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R.Rep. No. 94-196, 94th Cong., 1st Sess. 40, 41 (1975); see Bradley v. School Board of City of Richmond, 416 U.S. 696, 722, 40 L.Ed.2d 476, 494 (1974); see also Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392, 24 L.Ed.2d 593, 606 (1970).

The petitioners argue that they are

entitled to an award of attorneys fees against the respondents because a temporary restraining order was entered against certain Democratic Party defendants who are not respondents, because an earlier order of dismissal was vacated by the Court of Appeals without deciding the merits of that appeal, and because a three judge court was empaneled to hear the petitioners' claim. The court below determined that success on these sort of procedural matters does not constitute a benefit to the petitioners which would entitle them to an award of attorneys fees. No other Court of Appeals has decided this issue differently.

a. As to the ten-day temporary restraining order entered against parties who are not respondents.

The petitioners argue specifically that the temporary restraining order conferred a benefit in that it granted them the right "to cast absentee ballots pendente lite." (Pet., 8). However that temporary restraining order was obtained against officials of the Democratic Party of South Carolina, not against any of the respondents herein. The respondents are not even named in that order. Infra at 2-A. Furthermore, the order permitted the petitioners only "to vote in the August 29, 1972 Democratic primary election...." Id. It expired by its own terms on September 3, 1972, ten days following its entry. Id. The defendant party officials were directed to keep separately and count separately any ballots cast pursuant to

the ten-day order. Id. This order was simply a provisional remedy designed to protect the rights of the plaintiffs in the event that they were to prevail in any ultimate adjudication of their claim. However, they did not prevail and the order by its own terms lapsed. The petitioners have not proven that they obtained any relief from the respondents as a consequence of this litigation. They failed to establish their claim and consequently won no injunctive relief. (Pet., 15a, 16a-22a). It should be noted that they likewise proved no voluntary relief, as set out more fully below.

Nonetheless, the petitioners urge that the decision below denying them attorneys' fees is in conflict with decisions of other circuits. In Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), cert. granted, ___U.S.___, 100 S.Ct. 44 (1979), the Court of Appeals affirmed an award of attorneys fees against the defendants because the lawsuit had been concluded by a consent decree in which the plaintiffs obtained final relief on some of their claims. Supra at 340. The relief obtained in Gagne was a consequence of the litigation. In the instant case the petitioners failed to prove that they obtained any relief as a consequence of this litigation whether by settlement or by decree.

Their claim was rendered moot by an intervening revision of the State's election laws. Thus they were properly denied an award of attorneys' fees.

Likewise, in Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979) the Court of Appeals determined that the plaintiff would be entitled to an award of attorneys fees if as "a consequence of the filing of this suit [the plaintiffs had obtained relief] by way of a compromise or other agreement of the parties." Supra at 120. Again in the instant case the petitioners did not establish that they obtained any relief from the respondents. Therefore, they were properly denied an award of attorneys fees against the respondents, and there is no conflict between the decision below and the

decision of the Fifth Circuit Court of Appeals.

In Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) the Court of Appeals determined that the plaintiffs may be entitled to an award of attorneys fees "...if [they] can establish that their suit was causally related to the defendants actions which improved their condition." Supra at 281. In the instant case the District Court found no action which the respondents took to improve the condition of the petitioners. Consequently this decision of the Fifth Circuit Court of Appeals presents no conflict with the decision below.

Finally, Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979), presents no conflict because it deals with the causation of acts by defendants subsequent to the commencement of the lawsuit which provide relief to the plaintiffs. In the instant case, the record is silent as to the motivation for the revision of the state's election law. The petitioners did not make that an issue in the District Court. The District Court found no subsequent act taken by the respondents to provide the petitioners the relief they were seeking. The petitioners did obtain a ten-day temporary restraining order against persons who are not respondents. Later their claim was rendered moot by a revision of the state election laws which, from the record, occurred without any

involvement by the respondents. Since the petitioners failed to prove that they obtained any benefit from any of the respondents, there is no conflict between the decision below and the decisions of other Courts of Appeals.

b. As to the previous decision of the Court of Appeals vacating the previous order of dismissal.

The petitioners argue that they should be deemed the prevailing party in this litigation because in an appeal of the original dismissal of this action (Appendix, 36-39) the Court of Appeals "express[ed] no opinion on the merits," but vacated the order and remanded the case "to allow counsel to be heard for and against dismissal and to allow the District Court to state its findings of fact and conclusions of law...."

(Appendix, 46-48). They suggest that a conflict exists between Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974) and the decision below which held that the petitioners had not prevailed. In Van Hoomissen, a party petitioned the Court of Appeals for an award of attorney's fees as part of its cost in the Court of Appeals after successfully obtaining a dismissal of the appeal. Supra at 1132. The Court of Appeals awarded attorneys fees because the appellee " 'prevailed' on this interlocutory appeal." Supra at 1133.

The instant case is substantially different. Here the petitioners are not seeking an award of attorneys fees in the Court of Appeals and they are not seeking attorneys fees solely for their

efforts in that Court. Rather they are seeking a determination that they are the prevailing party in the entire litigation because the Court of Appeals, in an earlier appeal, vacated an order of dismissal and remanded the case as described above. Van Hoomissen does not even consider that question. Indeed it allows that the "prevailing party" for purposes of that appeal may not be the prevailing party in the "principal case." Supra at 1133. Consequently, there is no conflict with the decision below which found that the petitioners were not the prevailing party in this lawsuit, i.e., the "principal case," even though an earlier dismissal of their claim had been vacated and remanded by the Court of Appeals, for they obtained no benefit as

a consequence of this litigation. Gagne v. Maher, supra; Criterion Club of Albany v. Board of Commissioners, supra; Nadeau v. Helgemoe, supra; Ross v. Horn, supra.

The decision below does not conflict, even in principle, with the decisions of other Courts of Appeals. Actually the decision below conforms with the decisions of other circuits insofar as it requires the fee claimant to obtain a benefit from the party against whom the fee would be awarded. Therefore, the writ of certiorari should be denied.

II.

The Second Question Presented in the petition is not properly before this Court.

The petitioners have asked this Court to determine whether they "were prevailing

parties where the respondents allowed them to vote absentee in subsequent state elections without the necessity of further court order." (Pet., 3). However, the facts of record do not substantiate that the petitioners voted absentee as a result of this litigation in any state elections after the August, 1972, Democratic Party primary election which was the subject of the temporary restraining order entered in this case. The District Court did not make a finding that any subsequent absentee voting had been permitted by the respondents (Pet., 4a, 5a, 18a, 19a). Furthermore, the record does not reflect that the petitioner took exception to the findings of the District Court or that they sought to have the findings of the District Court amended with respect to subsequent

absentee voting by the petitioners in state elections.

There is a suggestion of subsequent absentee voting by the petitioners' attorney that a petitioner, Mr. Bly, held himself out as a "visiting scholar" and obtained an absentee ballot for elections not conducted by the respondents, specifically for the July 1974 Democratic Party primary and run-off election (Supplemental Appendix, 19, 51). Additionally, it is alleged in the respondents' Amended Answer that the petitioners were permitted to cast absentee ballots in the November 1972 General Election. However, the District Court made no finding whether Bly or any other petitioners actually did vote on these occasions or, if they did vote, pursuant to what authority they did vote. It should be noted that South Carolina election law had, even prior to the lawsuit permitted qualified students

to vote by absentee ballot.[3/] But the petitioners did not seek a finding of fact by the trial court that these suggested or alleged occasions of absentee voting were permitted as a consequence of this litigation or whether they were permitted under the absentee voting provision for students, or some other provision of law. Furthermore the petitioners have not shown that as a result of this litigation, either directly or indirectly, they were permitted on ony other particular subsequent occasion to vote by absentee ballot in a state election.

3/ Pursuant to South Carolina Act No. 977 of 1966 (1966 [54]2376) S.C. ACTS an absentee ballot was permitted to be sent to students who were registered to vote but who were residing outside the counties of their respective residences while enrolled in an institution of higher learning.

The Petitioner's Second Question is simply not properly presented for determination by this Court. It was not preserved in the trial court because the petitioners did not properly seek a finding that they did in fact vote in any subsequent elections nor did they rely on this theory in the Court below. Therefore the question is not properly before this Court. Tyrell v. District of Columbia, 243 U.S. 1, 61 L.Ed. 557 (1917); Phoenix Mutual Life Ins. Co. v. Raddin, 120 U.S. 183, 30 L.Ed. 644 (1887); see also Weade v. Dichmann, Wright & Pugh, 337 U.S. 801, 808, 93 L.Ed. 1704, 1708 (1949). For this reason the writ of certiorari should be denied.

III.

The decision below does not conflict with decisions of this Court allowing an

appellee to defend a judgment on any ground appearing in the record.

It is not disputed that "the appellee may...urge in support of a decree any matter appearing in the record." United States v. American Railway Express Company, 265 U.S. 425, 435, 68 L.Ed. 1087, 1093 (1924). In the instant case the appellees in the Court of Appeals "argue[d], for the first time, that they [were] the prevailing parties because ...they acted as a catalyst which caused or at least hastened the change of law which mooted their case." (Pet. 7a).

Although the petitioners urged that matter on appeal, the Court of Appeals rejected their argument for want of evidence in the record that the lawsuit had in fact acted as a catalyst. (Pet.

10a). It found that in the District Court the petitioners "failed to present any evidence on this point," or even to raise the argument. (Pet. 10a). The rule is well settled that a Court of Appeals has broad discretion in determining what questions it will take up and resolve for the first time on appeal. Singleton v. Wulff, 428 U.S. 109, 121, 49 L.Ed.2d 826, 837 (1976). The record clearly reveals that the petitioners did not seek to show, in the District Court, that they were a catalyst for the legislative change. Therefore the case should be treated in the posture and on the record on which the petitioners elected to rely in the District Court. Morrissey v. Brewer, 408 U.S. 471, 477, 33 L.Ed.2d 484, 492 (1972). Since the

record does not support the petitioner's contention that their lawsuit was a catalyst for the legislation which mooted their claim, the Court of Appeals did not err in rejecting their argument that they were the prevailing party.[4/]

The petitioners nevertheless urge that the "chronology of events" requires a finding that the petitioners caused the

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[4/] The state absentee voting law was revised in 1975 to extend the absentee ballot to broad categories of additional voters. Under the revised statute an absentee ballot could now be given to qualified voters who were absent from their residences on election day because of employment (including specifically government employment and professions of ministry, teaching, and medical), physical disability, death in the family, and vacation. § 7-15-320, Code of Laws of South Carolina, 1976. The petitioners happened to fall into one of those broad new categories and their claim was thus mooted.

subsequent legislative enactment. (Pet., 14, n.2., n.3.). In support of that argument, they cite several circuit court cases which suggest that "chronology of events" may be evidence of catalytic effect. But none of those cases raises the presumption of a catalytic effect from a given "chronology of events." Rather they regard the "chronology" as mere evidence.[5/] That is consistent with the

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5/ In International Society for Krishna Consciousness v. Anderson, 569 F.2d 1027 (8th Cir. 1978) the Court simply found that the plaintiff was the prevailing party, without stating any reasons to support that determination. Supra at 1029. The district court however had found that the defendant changed certain procedures which had mooted the plaintiff's claim. In the instant case there was no finding by the District Court that the respondents had taken action, voluntary or otherwise, to moot the petitioners' claim.

decision below in which the Court of Appeals expressly rejected the "chronology of events" evidence and the catalytic theory of the petitioners stating that "there is nothing in the record to indicate that the plaintiffs' efforts contributed to the amendment of the statute." (Pet. 112).

The petitioners were permitted in the Court of Appeals to defend the decree on any ground appearing in the record. However, the record did not permit the conclusion which the petitioners urged, and the Court of Appeals determined from the record that the District Court should be reversed. Therefore the writ of certiorari should be denied.

IV.

The decision below is consistent with

the legislative intent of the attorneys' fees award statutes at issue in this case.

The fee award statutes at issue in this case were enacted to compensate "private attorneys general" for their actions "to vindicate the fundamental rights here involved...." Sen.Rep. No. 94-1011, supra at 5; H.R. Rep. 94-196, supra at 40. In the instant case no rights of any sort were vindicated because the petitioners' claim was mooted by an intervening independent event. There was neither a voluntary settlement of the petitioners' claim, nor was there a judicial determination of that claim. (Pet. 7a, 15a). Since the petitioners vindicated no fundamental constitutional right as a result of this litigation, their claim for attorneys fees was

properly denied. Therefore the writ of certiorari should be denied.

V.

The questions presented by this case are not similar to those pending before this Court in another case in which certiorari has been granted.

The petitioners suggest that a similar issue is presented in Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979) cert. granted ___U.S.___, 100 S.Ct. 44 (1979). In that case however, the plaintiffs prevailed in obtaining through a consent order some of the relief which they were seeking in the litigation. Supra at 338. In the instant case there was no finding that the petitioners obtained any relief as a consequence of the litigation. Rather they obtained

their relief from an intervening revision of the state election laws that was not a consequence of the lawsuit. (Pet., 11a). Since the case of Maher v. Gagne, supra, presents a dissimilar issue to that of the instant case, the writ of certiorari should be denied.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

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ATTORNEYS FOR RESPONDENTS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Robert S. Bly, et al., Plaintiffs, vs. Daniel R. McLeod, Attorney General of South Carolina, et al., Defendants.	CIVIL ACTION No. 72-988

ORDER

Upon motion of the plaintiffs and for good cause shown it is hereby ORDERED that:

The temporary restraining order prayed for be issued pursuant to Rule 65(b) of the Federal Rules of Civil

Procedure restraining and enjoining the defendant members of the Executive Committee of the Democratic Party of South Carolina from enforcing any order, opinion, directive or other publication, official or otherwise, in any manner which denies plaintiffs absentee ballots with which to vote in the August 29, 1972 Democratic primary election, and from refusing to issue such ballots to plaintiffs.

This order shall take effect at 5:00 P.M. on the 24th day of August, 1972, and by the terms hereof shall expire ten (10) days thereafter.*

AND IT IS SO ORDERED.

S/ ROBERT W. HEMPHILL
Robert W. Hemphill
U.S. District Judge

August 24, 1972
Columbia, S.C.

*All absentee ballots furnished pursuant to this order shall be kept separately and counted separately, from all other ballots and thereafter retained by appropriate party officials.